LEGAL SUPERVISION OF THE TRANSPORTATION TAX.

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PROBABLY no one ever disputed the importance of superior communications; but thoroughfares are costly, and men have differed as to how their cost should be met. In transportation there are three chief items of expense: first, police protection for the traveller; second, construction and maintenance of the way; third, motive power, the vehicle, and the labor for operation. This outlay may be provided for by a tax on articles in transit, or by a levy on the whole community, or by a combination of both methods; but, down to the introduction of steam, the state rather tended to assume the burden, in order to equalize the contribution paid by the individual toward facilitating movement.

The primitive family is nearly self-sufficing; and, when exchanges are few, differences in the price of carriage do not work a drastic discrimination between localities. As circulation quickens, towns grow, industries multiply and specialize, and presently the item of freight becomes a prevailing factor in the success or ruin of individuals and cities.

Hence, tolls have been a fruitful source of revolution, and were one of the chief grievances which agitated the French in 1789. Clearly, where discrimination exists in the transportation tax, there oppression must prevail; for he who pays more than his neighbor to reach his market must, other things being equal, to that extent, be shorn of profit.

Under Louis XVI., the district tributary to Bordeaux was laid waste by exactions at the terminus, and Bordeaux's policy was not the exception but the rule. An urban community in America imports all necessaries, hence a discriminating railway rate affects the whole scale of living.

Experience has proved competition to be sharp enough without artificial aids, and men somewhat early had their attention drawn to the necessity of protecting the weak against the strong. One effort in this direction was the organization of a police to protect the traveller, instead of leaving him to arm himself, or to buy from those who bore arms. Another experiment was the maintenance of the way by society at large, instead of allowing some soldier to do the road-mending and compensate himself by fees for passage. At any rate, until steam came in, the individual might always provide his own vehicle and motor. With railways, that privilege ceased.

The progression is written upon every page of history. Standing armies cannot exist without industries and commerce, because farming communities, far from markets, have no surplus to spend for the soldier's wages. Hence, simple societies rely upon militia serving for short terms, and such a militia is worthless for siege operations. Therefore, after the fifth century, when exchanges almost ceased in the West, sovereignty, in the Roman sense, also ceased. He who could build a tower was a king, for he could not be coerced; and these tower-builders became the feudal nobles, whose privileges bore an exact ratio to the sum the nation could spend on police. In the tenth century, when industry fell lowest, the nobles culminated, and they charged what they pleased for the use of the ways. When, in the thirteenth century, manufacturing flourished, the nobles lost ground. Under opulent princes, like Saint Louis, a baron was held to his promise like any contractor.

Many processes are recorded. Among others, certain merchants of Berry in 1269, complained to Parliament that they had been robbed within the jurisdiction of the Lord of Vierzon, after payment for passage; and that noble was ordered to restore to the complainants the property which had been taken from them. In practice, however, in spite of supervision, the exaction of tolls by private individuals or corporations proved so unsatisfactory that many nations tried to give relief by constructing national thoroughfares. Colbert established several. The Canal of Languedoc, connecting the ocean with the Mediterranean, was built, by his advice, partly by the Crown and partly by the province. Finished in 1681, it long remained the engineering masterpiece of Europe.

The English neglected applied science until the middle of the

eighteenth century, and the government, when improved communications became a necessity, were incompetent to act. Consequently, individuals and companies obtained charters from Parliament authorizing them to build canals and turnpikes; but, as the tolls were also provided for in the charters, the interests of the public were supposed to be guaranteed. Nevertheless, the turnpike system was abandoned, while canals have lost importance because of railways.

Thus, when toward 1800 the United States began to expand with vigor, two methods offered for raising funds for thoroughfares. The Government might become proprietor, and pay the cost out of general revenue or by a system of tolls established by law; or the people might farm out to individuals the privilege of collecting the transportation tax for their own benefit, in consideration of providing the way. At the outset, government ownership commended itself. In 1808, Gallatin, as Secretary of the Treasury, recommended a system of communications to be opened between Maine and Georgia and between the Atlantic and the Mississippi. In 1806, Congress made an appropriation for the Cumberland Road; in 1825, John Quincy Adams, in his Annual Message, advocated internal improvements; while, in the same year, New York finished the Erie Canal, which, considering the resources available and the results produced, may, perhaps, deserve to rank as the most remarkable highway ever completed in America. Indeed, its wonderful success directly led to the reversal of what was then the national policy. Stimulated by New York, Pennsylvania plunged into a disastrous speculation.

As managers of private corporations, Americans have succeeded; but, when administering the States or the Nation, they have done less well, and nowhere has this characteristic been more visible than in Pennsylvania. The Pennsylvania Railroad rose to eminence in achieving the task which made the State insolvent. Between 1824 and 1842, the Commonwealth spent above $53,000,000 on thoroughfares which yielded no adequate return. In 1842, it suspended interest on its debt; and, in 1857, it gladly sold the property to the Pennsylvania Railroad for $7,500,000. Pennsylvania's misadventure practically ended experiments at State ownership, and thenceforward individuals assumed the administration of the railways, pretty much free from national supervision. The reason for this apparent apathy toward the public

interests was twofold. In the first place, when railways were introduced, they were so keenly desired that the people were ready to concede almost anything to obtain them; and, besides, for the United States to interfere with State corporations was a delicate matter fifty years ago. But, in the second place, toward the middle of the last century, men were dominated by certain theories of so-called political economy, among others that of the value of free competition to correct social ills. Applying this theory to railways, the inference was drawn that the average citizen would fare best in regard to transportation if railways were left to fight for existence among themselves.

Now, it seems evident that free competition means the destruction of the unfit and the survival of the strong. Possibly, it may be abstractly good that the feeble should perish, but, if pushed too far, the process may be dangerous. This has become clear to us, but it was not clear to the last generation, and for a time all went well.

Local companies issued stock and built short sections of road; and, as long as the adjacent population elected the directors, managements fostered the interests of those who lived along their lines. As competition worked, these conditions changed; and, as rates were cut at junctions, the companies, following the path of least resistance, transferred the burden of their tax from those who could escape them to those who could not.

A purchaser who can select his vendor can contract, but a purchaser who has no choice is subject to a servitude. For example, the French peasants had no choice as to where they should grind their corn. That they had to grind it at the lord's mill was a servitude. In like manner, a population with access to but one railway is subject to a servitude. It cannot escape the tax imposed upon it, unless it can obtain relief from a court.

The man who lives at the junction of several lines, on the contrary, may choose, his patronage being of value in proportion to the tonnage he offers. He who ships little will obtain small concessions, he who ships much will obtain large. Thus, the opulent shippers at the chief junctions became a favored class in regard to rates, and the junctions themselves became favored towns in proportion to the ferocity of the competition waged at them.

Competition worked similar results among the roads. Initial roads were constrained to control the whole line to the terminal

which served as their vent, else they might be throttled by an adversary. Thus, the strongest link in the chain absorbed the others, the stock passing from the neighborhood to magnates at terminals. In this way, an absentee ownership was created, and absentee owners always tend to ignore local complaints, as long as revenue remains satisfactory. Territory had also to be defended and feeders protected, and gradually the modern railway system came into being, covering vast areas, employing many thousand men, and wielding an arbitrary power over all the population living between junctions, with only the one outlet to the world.

This intermediate population not only could not escape, but could obtain no redress, while the dwellers at the junction could impose terms. Yet money for dividends had to be raised. As always happens the weak bore the burden.

> "For why? Because the good old rule
> Sufficeth them; the simple plan,
> That they should take who have the power,
> And they should keep who can."

Yet, in spite of taxing their intermediate country "all its traffic would bear," the trunk lines saw their revenues shrinking because of rate cutting at terminals, and they accordingly resorted to pooling.

The pooling contract amounts to an agreement among roads connecting the same cities to divide receipts according to a fixed percentage, and to do the work in common. Under such an arrangement, the inducement to underbid for tonnage is supposed to be eliminated, as each member's share of the pool is established beforehand. But where pooling begins, rebates and preferences should end, and here was the rock on which pooling split. Pooling is hated by magnates who obtain secret preferences which enable them to market their goods at a cost which ruins small concerns. Accordingly, pooling was denounced as a crime against the public who should enjoy free competition. Finally, a sort of commercial anarchy came to prevail, and discontent drove Congress in 1887 to pass an "Act to Regulate Commerce," of which hopes were formed which have not been realized.

The statute, being the resultant of conflicting forces, contained contradictory principles. While to gratify the lesser shippers,

preferences were forbidden, to pacify the great, pooling was forbidden as well. Hence, competition, while on one side condemned, was on the other enforced. In like manner, the intermediate country sought protection by a clause which made it illegal to charge more for goods carried a lesser than for those carried a greater distance. The railways tried to neutralize this clause by a rider providing that the restriction should be inoperative unless the traffic complained of should be done under "substantially similar circumstances and conditions." Lastly, Congress created a Commission to carry the act into effect, omitting to define precisely its powers. Such a statute was capable of different interpretations. It might be construed as limiting competition, protecting the intermediate country, discouraging preferences, and creating an effective board of arbitration to stand between the public and the corporations; or it might be considered as hardly more than declaratory of existing law, and as giving the Commission nothing by implication. The railways sustained the latter thesis, and convinced the majority of the Supreme Court. In effect, the judiciary threw its weight in favor of unlimited competition, and by so doing, for most practical purposes, annulled the statute. In The Alabama Midland *vs.* The Interstate Com. Com., Mr. Justice Harlan thus summed up the situation:

"The Commission was established to protect the public against the improper practices of transportation companies engaged in commerce among the several States. It has been left, it is true, with power to make reports, and to issue protests. But it has been shorn, by judicial interpretation, of authority to do anything of an effective character. It is denied many of the powers, which, in my judgment, were intended to be conferred upon it. Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of competing railway companies engaged in such commerce."

The facts support this statement of the learned justice, for the first step of the bench was to set aside the long and short haul clause, the next to eviscerate the Commission. A test case soon arose over export rates which settled the fate of the intermediate country.

In April, 1888, the New York Produce Exchange complained that the trunk lines charged one rate on goods consigned from Chicago to New York for domestic use, and a less rate, sometimes

one-half, for like goods when intended for export. The complainants asked that rates to New York should be equalized, and that discrimination in favor of exports should be suppressed. The New York Central favored the complainants, the Pennsylvania did not stubbornly oppose. The Commission found that the statute covered the case, and ordered the practice to cease. Most Eastern companies complied with this order: but, among others, the Texas and Pacific declined to do so, whereupon the Commission filed a bill in the Circuit Court to compel obedience.

Before the Circuit Court much new evidence was adduced. It was proved, among other things, that it cost 288 cents to transport 100 lbs. of books, carpets, and many such commodities from New Orleans to San Francisco, and only 107 cents to carry a like weight of the same articles, when on land in the same train, from London to San Francisco.

Admitting these facts, the railways contended that the competition of ships and of Canadian routes had so reduced freights to and from the Pacific, that, if they declined to accept the same scale, the business would leave the United States. This competition, they alleged, made the conditions under which transportation went on between foreign countries and Pacific ports dissimilar to the conditions which prevailed between American towns, and therefore they urged that the clause in the statute which forbade charging the greater sum for the shorter distance was inoperative. The Circuit Court and the Circuit Court of Appeals sustained the Commission, but the Supreme Court reversed these judgments. Forthwith, every carrier in the Union considered the long and short haul clause as annulled.

The companies next attacked the power of the Commission to adjust rates, and here, too, they succeeded even beyond expectation.

In Interstate Com. Com. *vs.* Cin., N. O. & Texas Pac.,* the Court held that Congress had not given the Commission power to prescribe rates, either directly or indirectly. In the case of the Alabama Midland, the whole subject was reargued, and the principle of competition carried out logically. The Court there decided that the existence of competition at any point may be considered in the making of domestic rates, and that, where competition creates dissimilarity of conditions, the roads may charge more for the shorter than for longer distance.

* 167 U. S., 479.

From this judgment Mr. Justice Harlan dissented, prophetically observing that the position taken by the Court might "well be regarded as recognizing the authority of competing railroad companies, . . . when their interests will be subserved thereby, to build up favored centres of population at the expense of the business of the country at large."*

Mr. Justice Harlan proved to be right. Mr. Smith, president of the Louisville & Nashville, has steadily insisted that railways are private enterprises to be run for the profit of owners. He has hesitated neither to put his theories into practice nor to defend them before the courts. Finding it profitable, he placed prohibitory rates on the staple commodities of his country seeking a vent through Savannah, in order to encourage Pensacola, where his company had a monopoly. He made the pay of his freight-agents depend on the quantity of freight diverted from Savannah, and he avowed the principle that a railway might make money as best it could by favoring its own.† The presiding judge, while admitting that, under the precedents, favoritism might be carried to a reasonable extent, thought interdiction of intercourse unjustifiable. How the Supreme Court would have ruled is uncertain, for Mr. Smith did not appeal.

In the Alabama Midland case, the Court decided that domestic competition might create such dissimilarity of circumstances as would justify the larger charge for the shorter distance, but did not specify precisely of what character such competition must be. In this doubt many towns, thinking themselves aggrieved, asked for relief; and, of these cases, perhaps the two most celebrated were those of Danville and Chattanooga. Danville had 20,000 inhabitants. The Southern absorbed all the lines there centring, and then charged higher rates than to more distant terminals. Among these, Lynchburg, Danville's rival, sixty-six miles distant, lay on the Chesapeake & Ohio which obeyed the statute. The Southern also entered Lynchburg. For freight carried sixty-six miles less, Danville annually paid the Southern $50,000 more than Lynchburg paid upon the same quality and weight of goods. Thereby, the Commission found, Lynchburg might "annihilate" Danville. But the courts sustained the Southern in making low rates to Lynchburg and earning its dividends from Danville.

* 168 U. S., 177.

† Interstate Com. Com. *vs.* Louisville & Nashville, 118 Fed. Rep., 618.

The Chattanooga case went farther. The Commission found Chattanooga to be 151 miles nearer New York than Nashville, and to be connected with Nashville by the Nashville, Chattanooga & St. Louis, the majority of whose stock was owned by the Louisville & Nashville. The L. & N. also connected Nashville with New York; and, to favor Nashville, the L. & N. gave it rates averaging, perhaps, 40 per cent. less than the rates to Chattanooga.

To meet this alleged competition the Chattanooga & St. Louis, the property of the L. & N., pretended that it must make equally cheap rates through Chattanooga to Nashville, so that a car-load of first-class freight from New York cost the Chattanooga jobber $456, and the same freight hauled in the same train cost the Nashville jobber, 151 miles farther off, $364, the Nashville merchant being thus enabled to undersell his Chattanooga rival, so to speak, on his own doorstep.

Judge Taft, in the Circuit Court of Appeals, held that genuine competition could not exist between the Louisville & Nashville and its chattel, the Chattanooga & St. Louis, and that the arrangement was a contrivance of the L. & N. to give Nashville an illegal preference, while exacting an unreasonable tax from Chattanooga.* The Supreme Court reversed this judgment.

Finally, to ascertain if a case could be presented which would hold under the long and short haul clause, the Commission selected the petition of one Calloway. Calloway was an inhabitant of La Grange in Georgia. La Grange lies seventy-one miles nearer New Orleans than does Atlanta, the terminal. Goods from New Orleans for Atlanta pass through La Grange. La Grange is on the Atlanta & West Point, one of the links of the line from Atlanta to New Orleans, a system of which the Louisville & Nashville forms a part. Hogansville, Fairburn and other towns lie between La Grange and Atlanta. The policy of the L. & N. in regard to its intermediate country is to take the terminal rate as the basis, and then add to this rate the local rate back to the point of destination. Thus on 100 lbs. of first-class goods sent from New Orleans to Atlanta, the Atlanta jobber paid $1 03. The citizen of Fairburn paid the rate to Atlanta, $1 03, *plus* eighteen miles back toward New Orleans, or $1 25 in all. Calloway paid $1 03 for the 495 miles haul from New Orleans to Atlanta, *plus* the local back toward New Orleans for 71 miles, or $1 43 in all.

* 99 Fed. Rep., 63.

Neither the La Grange, nor any intermediate, freight went to Atlanta, but was delivered in its natural order. The Commission found the cost of the so-called local service, which was most of the way conducted in through trains, did not materially exceed the cost of through service; yet the habit of the roads was to haul freight to Atlanta, deliver it, receive it again, load it, carry it back to La Grance and redeliver it, to compete with direct deliveries to Calloway. Thus, the principle of taxing the helpless country was to increase the charge in proportion as the work done diminished. La Grange paid 38 per cent. more than Atlanta, though Atlanta lay 71 miles farther off, and the rule held good for Hogansville, Fairburn and, indeed, all places which had no means of defence.

It was suggested that competition at Atlanta might have forced rates to so low a point that, though the rates to La Grange seemed relatively high, they were in reality cheap. In answer, Calloway proved that the average revenue per ton per mile received by the Louisville & Nashville south of the Ohio, was 8.28 mills; that the first-class rate to Atlanta yielded over 4.17 cents per ton per mile, and to La Grange 38 per cent. more, or about 5.75 cents.

Such tariffs are remunerative, as the condition of the Atlanta & West Point indicated. It appeared that the road had always defrayed the cost of improvements from earnings; also that, in 1881, it had declared a stock dividend of 100 per cent., and ever since, both on the old shares and the water, had paid 6 per cent. annually, or 12 per cent. on the original capital. The president explained that this was legitimate, as the rates of the road had been legal, and the owners, instead of caring for the property, might have taken all for themselves. In other words, he sustained the thesis that the public has no more right to control a railway than a grocery.

Supposing this doctrine conceded, Calloway easily showed that business could only be conducted in La Grange by favor of the railway, since the company could tax any trade out of existence. The Commission found as a fact that jobbers in La Grange were so taxed. Calloway, "as compared with his Atlanta competitor, is at a disadvantage in all the section to the north of La Grange, and in La Grange the Atlanta dealer can sell as cheaply as complainant can."

Upon this evidence, the Commission held the railway rates

from New Orleans to La Grange to be both "unjust and unreasonable in themselves, and as compared with their rates . . . to Atlanta."* On appeal, the Supreme Court reversed this ruling, Mr. Justice White intimating that he did not consider that the Commission had found the La Grange rates to be unreasonable in themselves, but only relatively unreasonable as compared with others which were competitive.

Until corrected by Mr. Justice White, the Commission supposed that they had expressly decided this point;† but their error was immaterial. Neither are judicial reservations of much moment. The decree is the essence. When relief is denied under certain admitted facts, men believe that, whatever judges may say, their decision is fixed, and in this instance both the public and the corporations considered that the courts had determined to give over the intermediate country to the railways. The long and short haul clause was abrogated; one hope only remained, that possibly the bench on further argument might construe the phrase "reasonable rates" more favorably for the public in the future than in the past.

Railway magnates were, however, inclined to jest at resistance. Counsel were persuaded that the judiciary would always allow the carriers ample discretion in the imposition of rates; while presidents freely said that they could prevent distasteful legislation. When the implied approval, in the La Grange case, of the device of stock-watering to halve a twelve-per-cent. dividend is coupled with the results reached in Smyth *vs.* Ames, the confidence of the lawyers seems not irrational. In Smyth *vs.* Ames the litigation arose over a Nebraska statute intended to remedy an alleged discrimination. The Nebraskans felt aggrieved because rates within their State were higher than those in adjoining States. Particularly it was averred that the Iowa schedules were 40 per cent. lower. Nebraska proposed to equalize matters by a reduction of about 29½ per cent. in local tariffs. The railways set up confiscation, contending that, on the basis proposed, local expenses would exceed local revenue. The Attorney-General offered to show that through business would yield good dividends even were local business done at cost, but that local business would not be done at cost but by a profit, since it would increase with cheaper trans-

* 7 I. C. R., 453.

† Interstate Com. Com. Report for 1898, page 32.

portation. The judges declined to be convinced, and sustained the carriers' contention that the act amounted to an attempt at local confiscation, though the companies, on the whole, might pay handsomely. In this connection, it is to be remembered that, within three years, Mr. Hill bought the Burlington, one of the threatened roads, for $200 a share, thus fixing on the State forever the burden of paying interest on 100 per cent. of water for which the people receive no consideration.

Incidentally, the courts had so construed the clauses forbidding rebates and preferences as to make them ineffective. Thus, it appears that toward 1900 the carriers had achieved a commanding position. They had broken down the protection which the Interstate Commerce Act was supposed to give the intermediate country, and they had won, with but one exception, every important case in which their rates had been challenged, when they had appealed to the Supreme Court. It only remained for them to gain control at the terminals to be, in substance, autocratic. The Sherman Act forbidding combinations in restraint of trade was the obstacle to be surmounted; for that statute, as interpreted, covered contracts between rival lines made to suppress competition. Various traffic agreements differing from ordinary pooling were tried and held bad, and, finally, merger seemed the only method left by which the object could be accomplished. In merger eminent counsel felt confidence, a confidence based upon the conviction that the Supreme Court could never be brought to affirm that a man may not invest his money as he pleases, provided the enterprise itself be lawful. The legislature might as well prohibit, said they, the purchase of two groceries, or of two house lots. If merger should prove to be a restraint of trade, it would be time to interfere when an overt act could be alleged.

Accepting these opinions, Mr. Hill prepared to merge the Burlington, the Northern Pacific, and the Great Northern. After a memorable struggle, Mr. Morgan acquired the stock; and then he and Mr. Hill proceeded to organize a holding company to cover the system. Thereupon the Northwest revolted and the President intervened. Obviously cause existed for alarm. Mr. Hill's merger reduced under one ownership all the practicable highways traversing a region half as large as western Europe, and a cursory reference to the adjudications will show the power which such a combination could exercise over the population subject to it.

Operating three roads in fact, though not in name, Mr. Hill could create technical competition at will. Chattanooga had been the victim of technical competition; for, when Chattanooga showed that the two roads said to be competing at Nashville, and thereby giving Nashville a preference of some forty per cent. in rates from New York, were actually owned by the same interest, the Supreme Court had not deemed this fact material.* The effect of this decision might be incalculable; for, wherever such peculiar competition could be proved, the power of the railways seemed to be without limit either as to the amount or the distribution of their taxation. The books teem with cases; but Danville and La Grange must serve for the present purpose.

In Danville, every pound of raw material, every manufactured article, every ton of coal, cost more than in Lynchburg. Yet it was admitted that the Southern lost no money by its Lynchburg schedule. "The difference in freight rates alone would afford a fair profit upon many manufacturing enterprises."† Mr. Culp, the manager of the Southern, was asked "what weight he gave to the interest of the city of Danville, to its proximity to Lynchburg, to the fact that it was a competitor of Lynchburg, and his reply in effect was, None."

But the Southern contended that on $120,000,000 of common stock, which had been issued as water at the reorganization, the road paid no dividends, and insisted that any order which tended to deplete revenue, amounted to confiscation of this stock.‡ Danville languished, and the Commission tried to give Danville relief, but the order of the Commission was reversed.§

In the Chattanooga case, the Louisville & Nashville, in the words of Judge Taft, alleged its "fostering care of Nashville" as a reason for giving that town a preference; and, when Chattanooga complained that because of this preference Nashville could undersell her at her own door, the defendant railroad set up competition at Nashville as the cause, although all the schedules were arranged by managers who obeyed Mr. Smith. To all intents and purposes, the two corporations formed one road, precisely as

* See opinion of Taft, J., in East Tenn. Ry. *vs.* Interstate Com. Com., 99 Fed. Rep., 63, reversed 181 U. S., 1.

† City of Danville *vs.* Southern Ry. Co., 8 I. C. R., 421.

‡ City of Danville *vs.* Southern Ry. Co., 8 I. C. R., 583, 584.

§ 122 Fed. Rep., 800.

Mr. Hill's three roads were to form one. Towns so situated appeared to have no rights which could be enforced in the courts. Calloway at La Grange showed that, by taxation, the railroad left him the option of abandoning his trade or his home; and that, though the through rates sufficed to earn six per cent. on the genuine stock of the Atlanta & West Point, other six per cent. was raised by arbitrary taxation from the intermediate country. Yet Calloway lost his cause. Taken together, the La Grange case and Smyth *vs.* Ames were believed to indicate that any proposition which threatened to curtail dividends would meet with no favor from the tribunal of last resort, and though, out of deference to proprieties, it might be well to keep the nominal dividend low by stock-watering, that in practice profits would be protected.

Thus many inhabitants of the vast region covered by Mr. Hill's combination had reason to fear, were he to consummate his scheme, that no industry could thrive, no town could even develop its street-railways, no port could count on merchandise to ship, no immigrant could settle on the land, no farmer could sell his crop, save at Mr. Hill's pleasure. In fine, were this merger to stand, in substance, the income of several millions of citizens would be the residue left them after the combination had helped itself. Had the people been assured that the burden, however heavy, would have been evenly distributed, the prospect would have seemed less intolerable; but Mr. Hill stood forth as the champion of low terminal and high intermediate rates, and Mr. Morgan was the greatest speculator in the world. No one knew when Mr. Morgan might wring the Northwest dry to make a favorable report of earnings for effect on the stock-market, for it is notorious that rates have often more to do with rapid turns in New York than with the condition of the country.

"Upon a recent inquiry into a general advance in rates to the Southwest the traffic-manager of an important system testified that he made the advance for the reason that the financial manager of his company in New York instructed him to do so. Here was no delicate adjustment of rates to conditions, but simply the imposition by the controlling authority . . . of a higher . . . tax upon its patrons; and this . . . by the fiat of its New York office."*

Approached thus, the issue is clear. Upon consultation with

* Interstate Com. Com., Rep., 1903, page 15.

his Attorney-General, Mr. Roosevelt probably perceived that, were he, as President, to countenance the merger, he would become a consenting party to the farming out, over nearly one-quarter of the Union, of an unlimited transportation tax, and this to irresponsible persons. Also, Mr. Roosevelt could hardly have failed to know that, if history teaches any lesson, it is the danger of farming out taxes to those whose interest lies in making them profitable. A long line of melancholy precedents, which extend from a period far antecedent to the trial of Verres, through the Middle Ages and the French Revolution, down to the present time, seems to indicate that irresponsible taxation can hardly be permanent, and that forcing competition to its logical end may have its perils. Suppose competition to go on until, by the destruction of the weak, all the highways of the nation fall under a single ownership, as those of the Northwest have already fallen. Almost certainly, that mass of capital would be assailed. To protect itself, it is conceivable that it might assume the government. This would be an empire, but, at least, it would be a conservative and responsible empire. Or, it is equally conceivable that total or partial confiscation of railway property might follow some convulsion, as Church property has been confiscated in Europe. This would be a movement toward socialism. Neither eventuality would commend itself to a sober American statesman. Meanwhile, a middle course is open. All railway men are not despotic, and many capitalists are sagacious. The Pennsylvania Railroad, for instance, has been liberal in its policy. The Pennsylvania has understood that it is not so much the amount of the tax levied as the equality of its incidence which makes a country prosperous and contented. The citizen can often afford to pay high, if no one, by preferences, can undersell him; but to be undersold is always ruin. Accordingly, the Pennsylvania has been willing to defer profits in order to build up its intermediate territory. It has not immolated the farmer, the small town, and the struggling industry for the sake of a quick return. It has observed the long and short haul clause, though the courts have declined to enforce it; and the community has reaped the benefit. The best commentary on the wisdom of this company is the high fortune of the State which it has served. If the Pennsylvania's policy could be extended throughout the Union by law, a condition of permanent equilibrium might be attained. Had the Supreme Court sustained

the merger, the prospect of such a settlement would have vanished, for the victors would have had nothing more to gain. Their sole preoccupation would have been to prevent legislative interference. Defeated, they may incline to compromise, since to legalize merger is important to them. Conversely, merger properly regulated is an advantage to the public, if for no other reason because by suppressing competition at junctions it makes easier a general equalization of rates. If, therefore, it could be agreed that with legalized merger should go an effective board for the equalization of the transportation tax, Congress might have little hesitation in taking the carriers out of the Sherman Act.

Doubtless, after the failure of the Interstate Commerce legislation any attempt at adjustment must be matter of anxiety, since no one can foresee what a statute will ultimately mean, and no one can foretell the disposition of the judiciary. Nevertheless, the difficulties might be lessened if, at the outset, the objects to be attained were defined. In the first place, nothing would be gained by the creation of a Government Bureau to meddle with the railway business. Officials could never successfully prescribe rates; the work is too vast and too complex. It is a fallacy to imagine that good can be done by correcting single items in a schedule. The schedule works as a whole, and the grievance is either that, as a whole, it is unjust, or that it is not observed, and secret preferences are given. If a man complain of the rate on steel, and the rate on steel be reduced by government command, it benefits no one if the road may raise its rate on lumber and food to compensate itself for the loss.

What a tribunal may judiciously do is to exercise a negative. On Calloway's complaint, for example, a judge might examine the La Grange schedules and, if he found them unreasonable, order the road, under a penalty, to bring in a corrected schedule. This it probably would arrange, out of court, with the plaintiff. If the traffic-manager found the plaintiff too stiff, he would have the choice of presenting his own revision for approval, or of appealing. In any event, on failure to agree between the parties, the court might fix a provisional basis on which to do business pending the final disposition of the litigation. No one practically conversant with these controversies will pretend that complete equalization is attainable. A thousand causes are at work to vary the expense of transportation in different localities. Still these

variations may be minimized, and absolute injustice eliminated. The weak need not be destroyed because their destruction may profit the strong. For example, Chattanooga need not be made to pay an excessive tax because the Louisville & Nashville is speculating in Nashville. On considering rates in relation to the return on capital, a stock dividend of 100 per cent. might be seriously weighed as relevant evidence. A telegraphic order suddenly raising rates without regard to local conditions might be scrutinized, and, if found to be connected with stock-manipulation, it might be dealt with otherwise than by a report to Congress a year afterward. The mere existence of such a tribunal, if permitted to perform its functions, would tend to alter the attitude of the people to the carriers, since citizens would feel that they were no longer subject to a servitude, but enjoyed an approach to the privilege of contract protected by the law.

To succeed, however, such a tribunal must have the support of the legal profession, it must be able to inspire respect, and it must possess local knowledge. Perhaps no better expedient could be devised than to appoint an additional circuit judge in each judicial circuit to take cognizance of these causes. Each magistrate might preside in his own circuit, and an appeal might lie to a full bench of railway judges, sitting occasionally. All this is matter of detail. The essential is the principle of arbitration between the public and the roads, and this must be the most important issue in the approaching election. The tariff cannot be changed without the consent of a Republican Senate. The nation's Asiatic policy must await future events, no matter which party wins; but the uncontrolled farming out of the transportation tax will be dealt with by the judiciary now. It is noteworthy that of the four judges who, in the Merger litigation, declared for railway absolutism, only one is a Republican. Mr. Roosevelt stands for the principle of legal supervision for the protection of the citizen; but, if he is defeated, the Supreme Court will be reorganized by him who has the appointing power during the next four years. A change of but one vote in that tribunal now would, apparently, suffice to endow consolidating capital with a power over taxation as despotic and as arbitrary as even those who have been most extreme have demanded. It would be superfluous to add that no issue can touch every citizen more nearly.

BROOKS ADAMS.